Nos. 72-216 and 72-433

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In the Supreme Court of the United States

OCTOBER TERM, 1972

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS

v.

THE WICHITA BOARD OF TRADE, ET AL., APPELLEES

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE WICHITA BOARD OF TRADE, ET AL., APPELLEES

On Appeal from the United States District Court for the District of Kansas

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MOTION OF THE SECRETARY OF AGRICULTURE TO AFFIRM

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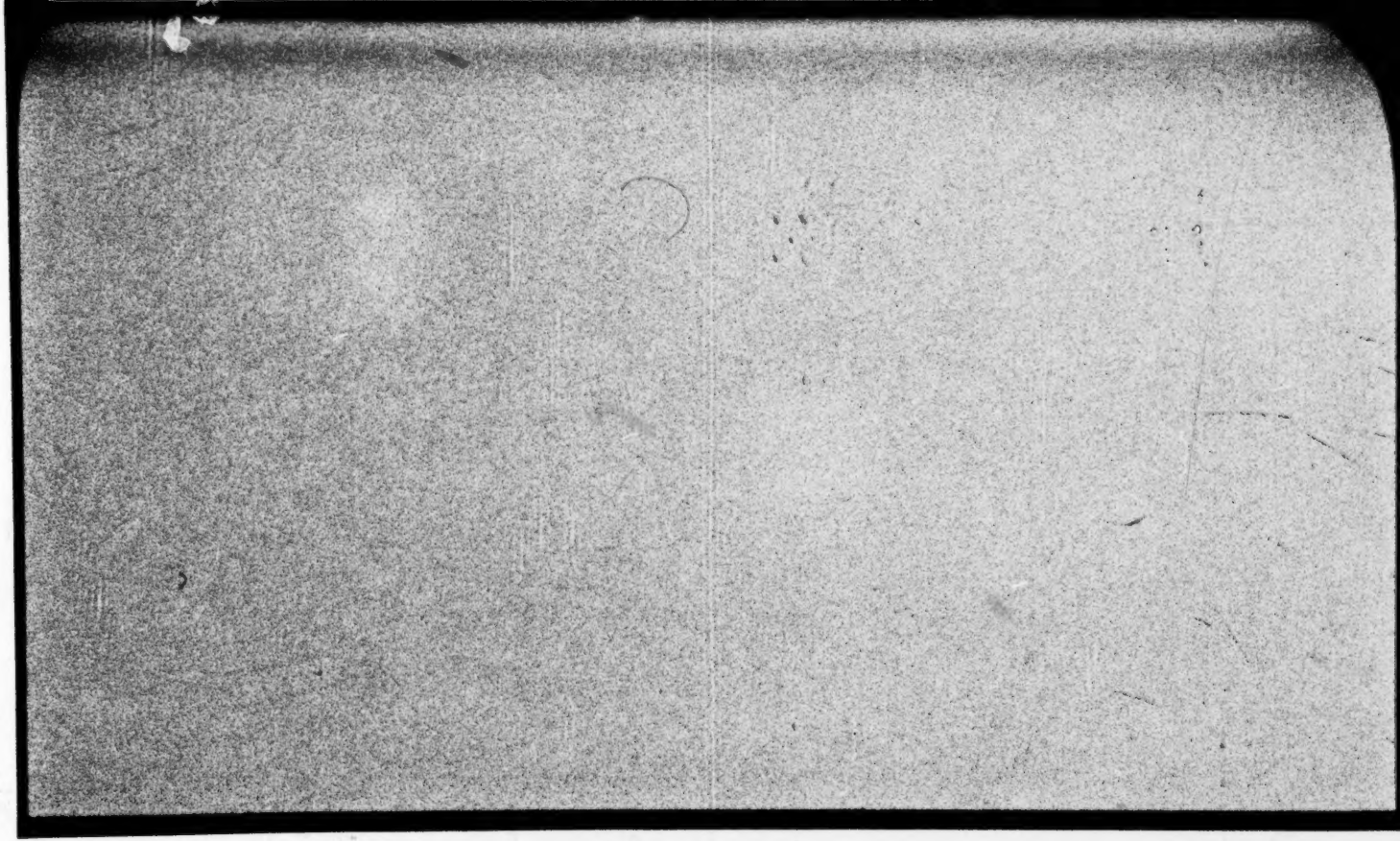

INDEX

	Page
Questions Presented	2
Statutes Involved	2
Statement	2
Argument	4
Conclusion	12
Appendix	13

CITATIONS

Cases:

Alabama Power Co. v. *United States*, 316 F. Supp. 337, aff'd 400 U.S. 73	7
Algoma Coal & Coke Co. v. *United States*, 11 F. Supp. 487	7
Arrow Transportation Co. v. *Southern Railway Co.*, 308 F. 2d 181	9
Arrow Transp. Co. v. *Southern R. Co.*, 372 U.S. 658	8, 9, 10
Atlantic City Electric Co. v. *United States*, 306 F. Supp. 338, aff'd 400 U.S. 73	7
Board of Governors, Etc. v. *Transamerica Corp.*, 184 F. 2d 311, cert. den. 340 U.S. 883, rehg. den. 340 U.S. 907	10
Board v. *Great Northern Ry.*, 281 U.S. 412	8
Brimstone R. R. Co. v. *United States*, 276 U.S. 104	7
Cantlay & Tanzola v. *United States*, 115 F. Supp. 72	8
City of Danville v. *Chesapeake & O. Ry. Co.*, 34 F. Supp. 620	7
Eagle Cotton Oil Co. v. *Southern Ry. Co.*, 51 F. 2d 443, cert. den. 284 U.S. 675	7
Electronic Industries Association v. *United States*, 310 F. Supp. 1286, aff'd 401 U.S. 967	7

Cases—Continued

	Page
Evans v. *International Typographical Union*, 76 F. Supp. 881	10
Grain and Grain Products, 205 ICC 301, 215 ICC 83	4, 6
Inland Steel Co. v. *United States*, 306 U.S. 153	10
Isbrandtsen Co. v. *United States*, 81 F. Supp. 544, app. dis. 336 U.S. 941	10
Mode-O-Day Corp. v. *Atchison T. & S. F. Ry. Co.*, 325 ICC 390	7
New England Divisions Case, 261 U.S. 184	5
Pennsylvania Motor T. Ass'n. v. *Port of Phila. M. T. Ass'n.*, 183 F. Supp. 910	10
Reconsignment Case No. 3, 53 ICC 455	3, 4, 5
Ringsby Truck Lines, Inc. v. *United States*, 263 F. Supp. 552, app. dis. 389 U.S. 576	8
Secretary of Agriculture v. *United States*, 347 U.S. 645	3, 6, 7
Terminal Charges at Pacific Coast Ports, 255 ICC 673	3, 4
Transit Charges, Southern Territory, 332 ICC 664	3, 4, 5
Unloading Lumber at New York Harbor, 256 ICC 463	3, 4
West India Fruit & Steamship Co. v. *Seatrain Lines, Inc.*, 170 F. 2d 775, cert. dis. 336 U.S. 908	10

Statutes:

Mann-Elkins Act of 1910, 36 Stat. 539 *et seq.*	8
28 U.S.C. § 1253	2
28 U.S.C. § 1336(a)	2, 13
28 U.S.C. § 1651(a)	2, 13
28 U.S.C. § 2324	2, 13
28 U.S.C. § 2325	2, 13

Statutes—Continued

Page

Administrative Procedure Act

Section 10(e), 5 U.S.C. § 706 ..... 2, 13

Interstate Commerce Act

Section 13(1), 49 U.S.C. § 13(1) 2, 10, 11, 14
Section 15(1), 49 U.S.C. § 15(1) 2, 11, 15
Section 15(7), 49 U.S.C. § 15(7) 2, 8, 9, 11, 16

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OCTOBER TERM, 1972

No. 72-214

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS

v.

THE WICHITA BOARD OF TRADE, ET AL., APPELLEES

No. 72-433

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE WICHITA BOARD OF TRADE, ET AL., APPELLEES

On Appeal from the United States District Court for the District of Kansas

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MOTION OF THE SECRETARY OF AGRICULTURE TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Secretary of Agriculture moves that the judgment of the district court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

1. Does the fact that a proceeding involves a large number of rates relieve the Interstate Commerce Commission of its statutory obligation to determine their reasonableness under established standards?

2. Does a level of rates originally prescribed by the Interstate Commerce Commission in 1934 but substantially increased by the railroads over the years in a series of non-prescribed, non-reviewable ex parte increases constitute a prescribed level of rates against which the reasonableness of other rates and charges may be gauged?

3. Does a three-judge district court have jurisdiction, ancillary to review of a final order of the Interstate Commerce Commission approving a new charge, to enjoin collection of the charge upon a finding that the order of the Commission is defective?

STATUTES INVOLVED

The statutes involved are Title 28 U.S.C. §§ 1651(a), 1336(a), 2324 and 2325; Title 5 U.S.C. § 706; and sections 13(1), 15(1) and 15(7) (49 U.S.C. §§ 13(1), 15(1) and 15(7)) of the Interstate Commerce Act. These statutes are set forth in the Appendix hereto.

STATEMENT

These are direct appeals under 28 U.S.C. 1253 from a decision of a three-judge district court (Railroad J. S. App. C) which remanded to the Interstate Commerce Commission the latter's decision and order in I. & S. Docket No. 8548, *Inspection in Transit, Grain and Grain Products*, 339 ICC 364, 340 ICC 69 (Railroad J.S. App. A and B, respectively), approving the imposition by the railroads of a separate charge for stopping carloads of grain in transit for inspection.

The Commission proceedings arose out of tariffs filed with the Commission by appellant railroads in February

1970 proposing to establish a separate charge of $14.33 per car for the first stop in transit for inspection, a service which for many years had been embraced in the line-haul rates. At the hearing, the railroads adduced evidence of the costs incurred in stopping a car in transit for inspection, and of the delays, in terms of lost car days, entailed in such stops. However, they presented no evidence of the cost of the line-haul service of which the stop for inspection was a part, nor did they divulge what portion of the line-haul rate represented compensation for the stop for inspection, although they conceded that the line-haul rates did in fact include compensation for the stop for inspection. The protestants, including the Secretary of Agriculture, objected to the separate charge as, in effect, a double charge for a single service. Protestants also pointed to the rule established by the Commission in prior decisions that where the railroads seek to establish a separate charge for a service embraced in the line-haul rate they must prove that the total transportation charges resulting from addition of the separate charge to the line-haul rate are just and reasonable. *Reconsignment Case No. 3*, 53 ICC 455; *Terminal Charges at Pacific Coast Ports*, 255 ICC 673; *Unloading Lumber at New York Harbor*, 256 ICC 463; *Transit Charges, Southern Territory*, 332 ICC 664. See also *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652.

By report and order served April 21, 1971 (Railroad J. S. App. A), the Commission's Division 2 found the proposed charge just and reasonable and otherwise lawful and discontinued the proceeding. Division 2 concluded that the in-transit inspection was neither mandatory nor essential to the orderly marketing of grain, that the evidence of the cost of the inspection stop adduced by the railroads justified the amount of the charge, that the charge would increase car utilization by eliminating the delays which attend inspection, and that its rule established in prior decisions requiring proof of the reason-

ableness of the total resulting charges was distinguishable because (1) the instant proceeding involved so many rates as to render such a requirement impractical and (2) the charge when added to the line-haul rate would not exceed the maximum level of rates prescribed by the Commission in Docket No. 17000, (Part 7), *Grain and Grain Products*, 205 ICC 301, 215 ICC 83. In a report and order on reconsideration served September 29, 1971, 340 ICC 69 (Railroad J. S. App. B), the full Commission reaffirmed the earlier decision of Division 2.

Appellees brought this action in the United States District Court for the District of Kansas, seeking to have the order of the Interstate Commerce Commission annulled, enjoined and set aside. The district court held that the Commission's findings in the above proceeding were not adequate to support its conclusions and remanded the matter to the Commission for further proceedings. The district court also ordered the charges then in effect suspended and ineffective until and unless otherwise ordered by the court.

ARGUMENT

1. Appellant railroads have challenged the correctness of the district court's decision on the merits on the ground that the court ignored the findings of the Commission and based on its decision on *dictum* in the Commission's order. The district court's decision was clearly correct, however, and the failure of the Interstate Commerce Commission to appeal on the merits is indicative of the insubstantiality of appellant railroads' appeal.

For over fifty years the Interstate Commerce Commission has required inquiry into the line-haul rate before approving a separate charge for a service already being performed under that rate. *Reconsignment Case No. 3*, *supra*, at 468; *Terminal Charges at Pacific Coast Ports*, *supra* at 677; *Unloading Lumber at New York Harbor*, *supra* at 468; *Transit Charges, Southern Terri-*

tory, supra at 683-684. As the Commission held in *Reconsignment Case No. 3, supra*: "Where a terminal service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not now segregate that service and assign to it a separate charge without taking into consideration, in order to justify such a charge, the entire through service of which it forms a part and the compensation heretofore received for such service." 53 ICC at 468.

In the present case, however, the Commission failed to follow this established rule. Instead, and without repudiating its prior decisions, it attempted to distinguish the present case from *Transit Charges, Southern Territory, supra*, the most recent of the above-cited line of cases, in which a similar charge was held unlawful. The Commission stated that "a requirement that the reasonableness of the proposed charges cannot be determined without 'reference to the line-haul rates, the services furnished thereunder, and the cost thereof,' effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a change" because of the thousands of individual line-haul rates involved. (Railroad J. S. App. A 32).

We submit that the district court properly rejected this rationale. The fact that a long-standing rule establishing a burden of proof may prove onerous in a particular proceeding is no justification for relieving the railroads entirely of their obligation to prove the reasonableness of the total charge resulting from the addition of the new charge to the existing line-haul rates. The Commission long ago devised a judicially acceptable solution to this problem by requiring introduction of typical evidence representative of the rate structure as a whole. See e.g., *New England Divisions Case*, 261 U.S. 184, 197-198. It was the statutory obligation of the Commission to determine the reasonableness of the charge consonant

with the standards and procedures it had developed over the years in similar cases. The Commission may, of course, revise and adapt those standards and procedures to meet changing situations. *Secretary of Agriculture* v. *United States, supra* at 652. Here, however, the Commission made no attempt to adapt its standards and procedures to the situation with which it was confronted. Rather, it simply abandoned its statutory obligation to determine the reasonableness of the total transportation charges resulting from the imposition of the new inspection charge.

Realizing, perhaps, the frailty of its rationale for departing from the rule of its prior decisions, the Commission made no mention of it in its summary of chief subsidiary findings. (Railroad J. S. App. A 51). Instead, it predicated its approval of the charge on a finding that the proposed charges when added to the line-haul rates do not exceed the maximum level prescribed in Docket No. 17000, Part 7, *Grain and Grain Products, supra.* (Railroad J. S. App. A 51).

This finding, as it stands, is factually incorrect. What the Commission meant, as it acknowledges elsewhere in its report, is that the proposed charges when added to the line-haul rates do not exceed the maximum level prescribed in Docket 17000, Part 7, *supra, plus all subsequent authorized general increases.* The distinction is significant, as but a single comparison readily demonstrates. The rate from Williston, North Dakota to Minneapolis, Minnesota prescribed by the Commission in 1934 was 27.5 cents per hundredweight. 205 ICC at 503. As a result of subsequent general increases, the rate between those same two points at the time the new charge became effective in May 1971 was 72.5 cents per hundredweight. This example is representative. Most, if not all, of the grain shipments in the West move on rates which greatly exceed the rates prescribed in 1934 in Docket No. 17000, Part 7.

The important point, of course, is that in general increase cases the Commission does not prescribe the increased rates nor does it pass upon the reasonableness of any particular rate or charge. Rather, it looks at the carriers' revenue needs and the general level of all rates. *Brimstone R.R. Co.* v. *United States*, 276 U.S. 104, 122. Increases which arise out of ex parte proceedings are therefore carrier made rates, not Commission prescribed rates. *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*, 51 F. 2d 443, 445 (5th Cir. 1931); *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 494 (E.D. Va. 1935); *City of Danville* v. *Chesapeake & O. Ry. Co.*, 34 F. Supp. 620 (W.D. Va. 1940); *Mode-O-Day Corp.* v. *A. T. & S. F. Ry.*, 325 ICC 390, 396. Furthermore, Commission orders approving general rate increases are unreviewable. *Atlantic City Electric Company* v. *United States*, 306 F. Supp. 338 (S.D. N.Y. 1969) and *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (D. D.C. 1969), both aff'd 400 U.S. 73; *Electronic Industries Association* v. *United States*, 310 F. Supp. 1286 (D.D.C. 1970), aff'd 401 U.S. 967. These decisions are premised upon the argument that since the rates in a general increase case are carrier made and not prescribed, they are subject to Commission adjustment in subsequent administrative proceedings. We submit that in this case where the Commission was called upon to determine the reasonableness of the total charges resulting from the combination of the existing line-haul rates and the new separate charge that it may not properly discharge this obligation by limiting its inquiry to whether the ex parte level is exceeded.

In *Secretary of Agriculture* v. *United States*, *supra*, this Court held that when the Interstate Commerce Commission departs from prior norms it must adequately explain the legal basis of its departure. Here, the Commission has attempted to explain its departure from prior norms by citing two "distinguishing features" present in the instant proceeding. However, as we have shown,

both of the Commission's attempted distinctions are invalid. Therefore, we submit that the District Court was constrained to remand the matter to the Commission. See *Ringsby Truck Lines, Inc.* v. *United States*, 263 F. Supp. 552, 558 (D. Colo. 1967), app. dis. 389 U.S. 576.

2. Appellants argue that in enjoining collection of the inspection charge the district court acted in "square conflict" with this Court's decision in *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658. This is simply not the case. In *Arrow*, the Court held only that, *prior* to a final order of the Commission, the courts are without power to extend the seven month suspension period provided for by section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7). The rationale behind the *Arrow* decision was that when Congress enacted the Mann-Elkins Act in 1910 (36 Stat. 552) and gave the Interstate Commerce Commission jurisdiction to suspend proposed rates pending final order by the Commission it extinguished judicial power to suspend such rates prior to such order.

Before the enactment of the Mann-Elkins Act there was a split of authority concerning the question of the power of a federal court to enjoin proposed rates prior to an administrative determination of their lawfulness, with the majority of lower federal courts being of the opinion that such relief could not be granted. *Board* v. *Great Northern Ry.*, 281 U.S. 412, 429. The exclusive authority to suspend proposed rates conferred upon the Commission by the Mann-Elkins Act was intended by Congress to remove the uncertainty which existed concerning the relief available to a shipper *prior* to an administrative determination of the lawfulness of a proposed rate. There is no evidence that Congress intended that provision to apply to the situation in which an administrative determination of the lawfulness of a rate has been made. This was recognized in the *Arrow* decision where, in explaining the decision in *Cantlay & Tanzola* v. *United States*, 115 F. Supp. 72 (S.D. Cal. 1953), this Court quoted with approval the statement in *Cantlay* that: "The

Congressional intent [underlying § 15(7)] plainly is that the courts not interfere to suspend carrier-made rates prior to an appropriate finding by the Interstate Commerce Commission. 115 F. Supp. at 83." 372 U.S. at 667, n. 15.

The distinction between suspension prior to Commission action and injunction thereafter was painstakingly drawn by the *Arrow* district court in its conclusions of law which the Court of Appeals quoted with approval, 308 F. 2d 181, 183:

CONCLUSIONS OF LAW

1. Section 15(7) of the Interstate Commerce Act grants exclusive authority to the Interstate Commerce Commission to suspend proposed railroad rates and limits that authority to a period of seven months from the proposed effective date of the rates unless further extended by consent of the carriers proposing the rates.

2. Courts are without authority to enjoin or suspend the effectiveness of rates published by common carriers subject to the jurisdiction of the Interstate Commerce Commission before the entry of a final order by the Commission approving the rates. The only jurisdiction of a court to enjoin or suspend the effectiveness of proposed common carrier rates arises after a final order of the Interstate Commerce Commission, and this is the authority vested in a specially constituted three-judge district court, upon complaint filed against the United States as a necessary defendant, to review the order of the Commission.

This Court noted the close nexus between the suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates. 372 U.S. at 668. The Court further specifically disclaimed any reflection upon "decisions which have recognized a limited judicial power to preserve the Court's jurisdic-

tion or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels." 372 U.S. at 671, n. 22. Surely, in the face of the district court's second conclusion of law, quoted with approval by the Court of Appeals, this Court was constrained to dissent had it considered the view there expressed to be erroneous.

The *Arrow* decision is clearly premised upon a presumed Congressional intention to preserve in the Interstate Commerce Commission exclusive jurisdiction to suspend proposed rates incident to its primary jurisdiction to determine their lawfulness. As such, it stands as an exception to the general rule that federal courts can employ injunctive relief to prevent irreparable injury pending such administrative determinations. *West India Fruit & Steamship Co.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775 (2d Cir. 1948), cert. dis. 336 U.S. 908; *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (S.D. N.Y. 1948), app. dis., 336 U.S. 941; *Pennsylvania Motor T. Ass'n* v. *Port of Phila. M. T. Ass'n.*, 183 F. Supp. 910 (E.D. Pa. 1960); *Board of Governors, Etc.* v. *Transamerica Corp.*, 184 F. 2d 311 (9th Cir. 1950); *Evans* v. *International Typographical Union*, 76 F. Supp. 881, 884 (S.D. Ind. 1948). The question of the jurisdiction of a district court to award injunctive relief after the primary jurisdiction of the Interstate Commerce Commission has been exhausted was not presented to the Supreme Court in *Arrow* and the Court specifically disclaimed any intention of ruling upon that question. See 372 U.S. at 671, n. 22. The rule established in *Arrow* should not be extended to oust federal courts of their traditional power to grant injunctive relief ancillary to review of administrative orders.

Furthermore, it is settled that district courts have jurisdiction to enjoin the effectiveness of tariffs upon review of Commission action in complaint proceedings brought under section 13 of the Interstate Commerce Act, 49 U.S.C. 13. *Inland Steel Co.* v. *United States*,

306 U.S. 153. Whether the Commission completes its investigation prior to expiration of the statutory seven month suspension period or not, section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), empowers the Commission to make such order with reference to a proposed rate as would be proper in a proceeding initiated after the rate had become effective, *i.e.*, upon complaint under section 13 or on the Commission's own initiative under section 15(1), 49 U.S.C. 15(1). We perceive no relevant distinction between a proceeding under section 15(7) of the Act and a proceeding under section 13 of the Act which would justify denial of equitable relief upon review of final Commission action in the former. In both cases the Commission's primary jurisdiction has been exhausted.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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I authorize the filing of this motion.

ERWIN N. GRISWOLD
Solicitor General

OCTOBER 1972

APPENDIX

Title 28 U.S.C. § 1651 (a)

§ 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Title 28 U.S.C. § 1336 (a)

§ 1336. Interstate Commerce Commission's orders.

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in any part, any order of the Interstate Commerce Commission.

Title 28 U.S.C. § 2324

§ 2324. Stay of Commission's order.

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

Title 28 U.S.C. § 2325

§ 2325. Injunction; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Title 5 U.S.C. § 706

§ 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant

questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Title 49 U.S.C. § 13 (1)

§ 13. Complaints to and investigations by Commission.

(1) Complaint to Commission of violation of law by carrier; reparation; investigation.

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions

thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Title 49 U.S.C. § 15 (1)

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(1) Commission empowered to determine and prescribe rates, classifications, etc.

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter,

the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Title 49 U.S.C. § 15 (7)

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(7) Commission to determine lawfulness of new rates; suspension; refunds.

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for

such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

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